

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000567-001 DT

06/21/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

ARDEN JUDD

JOHN M PEARCE

v.

STEPHEN A OWENS (001)
ARIZONA STATE DEPARTMENT OF
ENVIRONMENTAL QUALITY (001)

MICHELLE ANNE DE BLASI
SHELLEY D CUTTS

OFFICE OF ADMINISTRATIVE
HEARINGS

MINUTE ENTRY

Arden and Anthony Judd dba Judd Auto Service (“Judd Auto”) appeal from a final administrative decision of Stephen A. Owens (“Director”) in his capacity as Director of the Arizona Department of Environmental Quality (“ADEQ”) that granted ADEQ’s request for review and remanded to ADEQ for reconsideration of its final determination regarding recovery of certain costs from the Underground Storage Tank (“UST”) State Assurance Fund.¹ The Director’s Decision rejected a recommended decision issued by the Administrative Law Judge (“ALJ”) that denied ADEQ’s request to amend its final determination, or to remand, regarding the costs at issue.² This Court has jurisdiction of this administrative appeal pursuant to the Administrative Review Act, A.R.S. § 12-901, et seq. This case has been under advisement and the Court has considered and reviewed the record of the proceedings before ADEQ, the Office of Administrative hearings (“OAH”) and the memoranda submitted by counsel.

¹ Decision and Order, *In the matter of: JUDD AUTO SERVICES*, Docket No. 02A-F-174-DEQ and Docket No. 02A-F-175-DEQ, May 1, 2003 (“Director’s Decision”).

² Administrative Law Judge Decision and Recommended Order, *In the Matter of: JUDD AUTO SERVICES*, Office of Administrative Hearings, Docket No. 02A-F175-DEQ, February 7, 2003 (“ALJ Decision”).

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1. Factual and procedural background

A.R.S. § 49-1031 *et seq.* establishes a UST State Assurance Fund (“SAF”), that is supported by a tax on petroleum sales from USTs in Arizona. The fund is administered by ADEQ and the money in the SAF can be distributed to persons conducting corrective actions relating to petroleum releases from USTs in Arizona. Those wishing to access money in the SAF must submit an application and supporting documents to ADEQ. ADEQ then renders an initial determination that can be informally appealed to ADEQ and eventually issues a final determination which can be formally appealed.

Judd Auto is the owner/operator of an UST site located in Fredonia, Arizona (“the Site”).³ Contamination was discovered at the Site and Plaintiff performed corrective activities.⁴ In May and July, 2001, Judd Auto filed the applications at issue for reimbursement of corrective action costs incurred in the cleanup of a leaking UST at the Site.⁵ The costs associated with the corrective action activities for which Judd Auto sought SAF reimbursement were covered by Judd Auto’s insurance carrier, American International Recovery, Inc. (“AIG”) under an applicable insurance policy and the applications requested payment directly to AIG.⁶ ADEQ issued its Final Determinations on Judd Auto’s Applications .04 and .05 in which it denied certain corrective action costs claimed by Plaintiff.⁷ ADEQ stated several reasons for its denials in the Final Determination. The fact that AIG was the insurer and payee or that Judd Auto was receiving assistance from an insurance company in funding corrective action expenses was not referenced by ADEQ in the Final Determinations.⁸ Judd Auto appealed the Final Determinations and a hearing was set for February 7, 2003 before the OAH.⁹

Prior to the hearing, ADEQ filed two Motions for Leave to Amend Final Determination or, in the alternative, Motion to Remand Final Determination to ADEQ (“Motions to Amend”).¹⁰ The Motions to Amend Final Determinations sought to include A.R.S § 49-1054(E) as a basis for denial of the requested coverage of costs. That denial would be based upon the fact that the corrective actions costs had been paid by insurance.¹¹ The ALJ set the original hearing date of February 7, 2003 to hear argument regarding the amendment issue.¹² At the hearing, the parties informed the ALJ that they had resolved the underlying costs issues related to the applications.¹³

³ Record on Review, 11, Tab 1, 12, Tab 1 (hereafter “ROR, ____”).

⁴ Id.

⁵ Id.

⁶ ROR, 15a, Attachment 3; Id.

⁷ ROR, 12, Tab 5, 11, Tab 5.

⁸ Id.

⁹ ROR, 2.

¹⁰ ROR, 8. A motion was filed with respect to each application.

¹¹ Id.

¹² Minute Entry, February 5, 2003; ROR, 13.

¹³ ALJ Decision, ¶ 1.

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Accordingly, the ALJ considered only the ADEQ Motions to Amend final determinations and ADEQ's request that the relevant insurance policies be provided to ADEQ by Judd Auto.¹⁴ After the hearing, the ALJ issued a decision denying ADEQ's Motions to Amend and also ordering Judd Auto to provide the applicable insurance policy to ADEQ.¹⁵

The ALJ's Decision, along with the record was forwarded to the Director for review. The Director issued a Final Decision and Order adopting the ALJ's Decision that the matters be dismissed, but notifying the parties that he would consider motions for rehearing or review.¹⁶ ADEQ filed a Motion for Review in which it asked the Director to review the ALJ decision that denied ADEQ's Motions to Amend and the Director's prior decision and order.¹⁷ Judd Auto responded and on May 1, 2003, the Director issued a Decision and Order that remanded both applications to ADEQ for reconsideration in light of the applicable insurance coverage, with payment "stayed until the ADEQ revises its Final Determinations" to include a determination whether A.R.S. § 49-1054(E) precludes payments to Judd Auto on both applications.¹⁸ The Director concluded that the ALJ was wrong to deny ADEQ leave to amend its Final Determinations to include consideration of the applicable insurance coverage because, according to the Director, A.R.S. § 49-1054(E) precludes payments from the SAF when corrective action costs are paid by private insurance.¹⁹ Plaintiff timely filed this appeal from the Director's Decision and Order and contends that the Director is without authority to remand the applications to ADEQ to reconsider the Final Determinations.²⁰

2. Standard of Review

The issues in this appeal involve the question whether the Director is authorized to remand to ADEQ for reconsideration of its previous final determinations with respect to applications for payment from the SAF and whether the Director's Decision rejecting the ALJ's

¹⁴ ALJ Decision, ¶¶ 2, 3.

¹⁵ ALJ Decision. The ALJ had previously granted the ADEQ Motions to Amend. Minute Entry, February 3, 2003. Thereafter, Judd Auto responded to the motions and in its decision, the ALJ rescinded his previous decision that granted the motions. ALJ Decision, ¶ 4.

¹⁶ Final Decision and Order, March 13, 2003 ("Director's March 13 Decision").

¹⁷ ROR, 15a.

¹⁸ Director's Decision.

¹⁹ *Id.*

²⁰ Complaint, June 11, 2003, ¶¶ 24, 25; Judd Auto also argues that the Director erred in his conclusion that A.R.S. § 49-1054 (E) precludes payment from the SAF when corrective action costs are paid by private insurance. Plaintiff's Opening Brief, pp. 16-32. This issue was addressed by this Court in *Bennett's Oil Co. v. Owens*, LC2003-000524-001DT, January 12, 2004 ("Bennett's Oil"). There, this Court concluded that A.R.S § 49-1054(E) precludes payment from the SAF for any costs covered by insurance. For the reasons set forth in *Bennett's Oil*, this Court concludes here that the statute precludes payment when costs are paid by insurance. Accordingly, the only issue in this appeal is whether the Director abused his discretion or otherwise acted contrary to law when he remanded to ADEQ for reconsideration of its final determinations.

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Recommended Decision was an abuse of discretion or is otherwise contrary to law. On appeal of an administrative agency's decision pursuant to the Administrative Review Act, the Superior Court determines whether the administrative action was supported by substantial evidence, was contrary to law, was arbitrary and capricious, or was an abuse of discretion.²¹ As to questions of fact, this Court does not substitute its conclusion for that of the administrative agency, but reviews the record only to determine whether substantial evidence supports the agency's decision.²² Questions of statutory interpretation involve questions of law and the Superior Court is not bound by the administrative agency's conclusion.²³ The reviewing court applies its own independent judgment to questions of statutory interpretation.²⁴ The reviewing court may draw its own conclusions as to whether the administrative agency erred in its interpretation and application of the law.²⁵ This Court reviews the issues presented in this case regarding the question of the Director's authority *de novo*.

3. Discussion

The general rule in Arizona has long been that the powers and duties of administrative agencies are to be measured by the statute creating them.²⁶ Arizona courts have consistently held that a statute or properly adopted agency rule that authorizes rehearing provides an administrative agency with the power to reconsider its decisions.²⁷ Moreover, if rehearing is authorized, an agency decision does not become final until a requested rehearing is denied or acted upon.²⁸ In pertinent part, A.R.S. § 12-901(2) provides:

In all cases in which a statute or rule of the administrative
agency requires or permits an application for a rehearing or
other method of administrative review, and an application
for a rehearing or review is made, no administrative decision

²¹ A.R.S. § 12-910(G); *Siegel v. Arizona State Liquor Board*, 167 Ariz. 400, 401, 807 P.2d 1136 (App. 1991).

²² *Petrilas v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107 (App. 1981). This case was decided as a purely legal question. The few background facts relied upon by the ALJ are not questioned in this appeal.

²³ *Seigal v. Arizona State Liquor Board*, supra.

²⁴ *Webb v. State ex rel. Arizona Bd. of medical Examiners*, 202 Ariz. 555, 557, 48 P.3d 505, 507 (App. 2002).

²⁵ *Carondelet Health Services v. Arizona Health Care Cost Containment System Administration*, 182 Ariz. 502, 504, 897 P.2d 1388 (App. 1995).

²⁶ E.g., *Ayala v. Hill*, 136 Ariz. 88, 664 P.2d 238 (App. 1983).

²⁷ *Guminski v. Arizona State Veterinary Medical Examining Board*, 201 Ariz. 180, 33 P.3d 514 (App. 2001) (Administrative decision sanctioning Guminski became final upon the agency's denial of her request for rehearing because statutes and rules provide for rehearing of Veterinary Board's decisions.); *Boyce v. City of Scottsdale*, 157 Ariz. 265, 756 P.2d 934 (App. 1988) (A lawfully adopted rule providing for rehearing of decisions provides the Scottsdale's Board of Adjustment the power to reconsider its decisions.); *Sun Valley Express Moving and Storage, Inc. v. Arizona Department of Economic Security*, 140 Ariz. 131, 680 P.2d 841 (App. 1984) (Because the statute specifically authorizes the Department to reconsider a decision, the Department of Economic Security abused its discretion by refusing to reconsider a liability determination which had become final.)

²⁸ A.R.S. § 12-901(2)(Supp. 2001).

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of such agency is final as to the party applying for the rehearing or review until the rehearing or review is denied or the decision on rehearing or review is rendered.

Relevant statutes and administrative rules provide for rehearing of ADEQ's decisions. A.R.S. § 41-1092.09(A)(1) provides that "[a] party may file a motion for rehearing or review within thirty days after service of the final administrative decision." A.A.C.R18-1-207 is the applicable rule governing rehearing of ADEQ's decisions. A.A.C.R18-1-207 provides that a "party to a formal adjudicative proceeding before the Office of Administrative Hearings or the Department may obtain a rehearing or review of the decision that is based on the proceeding...." The statutory provisions and agency rules that authorize rehearing, provide ADEQ with the power to reconsider its decisions.

In essence, Plaintiff contends that ADEQ lost any jurisdiction in this case, other than for the appeal, once it issued its Final Determinations.²⁹ In support of his argument, Plaintiff cites A.R.S. § 49-1091(E) which provides that "the final written decision or determination is the only decision or determination that is appealable. . ." According to Plaintiff, the entire regulatory scheme limits the appeal to the final determination, which in turn limits the issues on appeal.³⁰ Plaintiff argues that because the final determination is the "only decision or determination that is appealable as an appealable agency action as defined in § 41-1092," ADEQ was divested of authority to take further action. Plaintiff's argument fails however, because A.R.S. § 41-1092(9) itself provides for rehearing of a final administrative decision. Identifying a decision as final is not inconsistent with rehearing that decision. This court concludes that ADEQ is authorized to reconsider its decisions.³¹

In *Better Homes Construction Inc., v. Goldwater*,³² the Registrar of Contractors rejected the ALJ's recommended order in that the Registrar decided to revoke Better Homes' license, not merely suspend it. Better Homes contended that the revocation decision was barred by the earlier decision of the ALJ. The court disagreed. "Because Better Homes requested a rehearing after the initial decision, the first decision never became a final administrative decision. Rather, the decision upon rehearing, the one that revoked Better Homes' license, became the *only* final decision."³³

Subject to the requirements of A.A.C. R18-1-207, the Director is authorized to grant a motion for rehearing or review. Here, the Director's Decision specified that review was being granted because: 1) Appellant's insurance policy confirms that that "corrective action costs incurred by Appellant are reimbursable under the policy" and therefore payment would be

²⁹ Reply Brief, pp. 9-10..

³⁰ *Id.*

³¹ *Wammack v. Industrial Commission*, 83 Ariz. 321, 320 P.2d 950 (1958) ("The power to reconsider is inherent in the power to decide.").

³² 203 Ariz. 295, 53 P.3d 1139 (App.2002).

³³ *Id.*

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precluded by law; 2) the “insurance issue” had not been appropriately dealt with by the ALJ; and, 3) the “insurance issue” was clarified by the Bennett Oil case decided while this case was pending.³⁴ In sum, the Director granted review because payment pursuant to the ALJ Decision would require ADEQ to violate law and ADEQ had tried during the appellate process to raise the “insurance issue.” Plaintiff would freeze time and require ADEQ to ignore the clarification provided by the agency’s decision in Bennett’s Oil, affirmed by this Court. This Court agrees with the Director that “ADEQ is required by law to administer the SAF subject to the prohibition that it not reimburse for corrective action costs which have been or will be covered by insurance even if it does not make this position clear until late in an appellate process.”³⁵

ADEQ did not raise the “insurance issue” in this case until after it issued the Final Determinations. Indeed, the agency’s historic practice appears to have allowed claims such as the claims involved in this appeal. However, even if the agency misapplied the statute in the past, there is a strong public policy against allowing the mistakes of an agency or employee to limit the government’s ability to enforce its laws.³⁶

Finally, Plaintiff contends that raising the issue during an administrative appeal is unfair to the applicant. However, any unfairness could have been minimized by the ALJ granting a continuance to permit the applicant to address the issue.³⁷ Moreover, such accommodations are preferable to requiring the agency to act contrary to law. Because the Director acted to ensure that ADEQ does not violate the law with respect to Plaintiff’s applications, it was not an abuse of discretion or contrary to law for the Director to grant ADEQ’s Motion for Review.

Conclusion

The only issue in this administrative appeal is whether the Director abused his discretion or otherwise acted contrary to law, when he remanded to ADEQ for reconsideration of its Final Determinations with respect to Plaintiff’s applications for payment from the SAF. The statute and agency rule that authorize rehearing provide ADEQ with the power to reconsider its decisions. ADEQ’s repeated attempts to raise the “insurance issue” with respect to the applications were unsuccessful. The Director’s Decision provides ADEQ the opportunity to correct its mistake. The purpose of the rehearing provision is to give an agency an opportunity to correct its own mistakes before the matter is brought to court.³⁸ Because there is a strong

³⁴ Director’s Decision. The Director’s stated reasons for granting review comply with the requirements of A.A.C.R18-1-207. At a minimum, the ALJ Decision was contrary to law. Plaintiff’s insurance policy was provided to ADEQ pursuant to the ALJ Decision.

³⁵ Director’s Decision, p 2.

³⁶ *Lake Havasu City v. Arizona Dept. of Health Services*, 202 Ariz. 549, 552, 48 P.3r 499, 502 (App. 2002). In that case, the Arizona court adopted the policy articulated by the United States Supreme Court in *Brock v. Pierce County*, 476 U.S. 253, 262, 16 S.Ct. 1834 (1986).

³⁷ Director’s Decision, p. 2.

³⁸ *Cogent Public Serv., Inc. v. Arizona Corp. Comm’n*, 142 Ariz. 52, 54, 688 P.2d 698, 700 (App. 1984.).

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public policy against allowing the mistakes of an agency to limit the government's ability to enforce its law, ADEQ's rehearing provision should be applied so as to uphold that purpose.

IT IS THEREFORE ORDERED denying the relief requested in the complaint by the Plaintiff in this case.

IT IS FURTHER ORDERED affirming the decision of the Director of ADEQ in this case.

IT IS FURTHER ORDERED that counsel for the defendant shall lodge an order consistent with this minute entry no later than July 30, 2004.